Mar 26. Affirmed - Mayor &c

Mr Ch. Jus. Chase

SUPREME COURT OF THE UNITED STATES.

No. ~~273.~~ ~~188.~~ 96. ~~96.~~ ~~62.~~
" 60.

LOUIS DESOBRY, PLAINTIFF IN ERROR,

vs.

JOHN NICHOLSON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF LOUISIANA.

GIDEON, Printer, 511 Ninth Street, Washington, D. C.

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GIDEON, Print.

United States Circuit Court, Fifth Circuit and Eastern District of Louisiana.

(Petition, filed 16th April, 1859.)

To the Honorable the Judges of the Circuit Court of the United States, for the Fifth Circuit, Eastern District of Louisiana:

The petition of John Nicholson, a resident of the City of Pittsburgh and a citizen of the State of Pennsylvania, respectfully represents, that Louis Desobry, a citizen of the State of Louisiana and a resident of the parish of Iberville, within the jurisdiction of this honorable court, is truly and justly indebted unto petitioner in the full sum of three thousand eight hundred dollars, with eight per cent. interest thereon, from March, 1849, for this, to wit:

That the firm of Arthurs, Armstrong & Co., doing business at Pittsburgh, composed of John Arthurs, Francis Armstrong, and petitioner, all citizens of the State of Pennsylvania, on the nineteenth day of December, 1846, entered into a written contract with the defendant, to build him a steam engine and mill, which contract is hereto annexed and made part of this petition; that by the terms of said contract, the engine and mill were to be put up ready for use by first of October, 1847; that the price was five thousand eight hundred dollars—two thousand dollars on the delivery of the machinery; two thousand dollars on the first of March, 1848; and one thousand eight hundred dollars in March, 1849, with eight per cent. interest per annum, as will more fully appear from said contract.

Your petitioner represents, that before the completion of said contract, the firm of Arthurs, Armstrong & Co. was dissolved, and that petitioner became liquidator of the affairs of said firm, and owner of all assets, contracts, &c.

Petitioner now represents that the contract was fully executed on his part, and the engine and mill delivered and put up on defendant's plantation, according to the contract on his part; that at the time specified defendants had not made the foundation and frame work for the machinery; that when he did make the foundation he used inferior materials; that the foundation and frame work were not solid, and not capable of supporting with firmness the engine and mill.

Petitioner further avers, that the defendant never informed petitioner, by letter or otherwise, that there was any fault or defect in the engine and mill, but, on the contrary, petitioner avers that he made repeated demands for payment; that the defendant never replied to his demands, but remained silent, and never offered to pay, and never gave any excuse for not paying.

Petitioner avers, that defendant accepted said engine and mill, and has used and still uses said machinery without paying for the same.

Petitioner admits that defendant made the first payment according to the stipulation of the contract, to wit: the payment of two thousand dollars.

Petitioner avers further, that he brought suit upon this contract, in this honorable court, on or about the month of April, 1857, which suit was transferred to the Fifth District Court of New Orleans, and that, owing to the rejection of petitioner's evidence, a judgment of non-suit was rendered, reserving the right to institute suit again without prejudice.

Wherefore, petitioner prays that said Louis Desobry be cited to appear and answer this petition; that, after due proceedings, that judgment be rendered in favor of petitioner, and against defendant, for the full sum of three thousand eight hundred dollars ($3,800,) with eight per cent. interest from the month of March, 1849, and all costs of suit, and for general relief; and petitioner prays for a trial by jury.

J. LIVINGSTON,
Attorney for Petitioner.

(Contract—annexed to Petition.)

Article of agreement, entered this 19th day of December, in the year of our Lord one thousand eight hundred and forty-six, between Arthurs, Armstrong & Co., of the City of Pittsburgh, Pa., of the one part, and Louis Desobry, of the Parish of Iberville, Village of Plaquemine, of the other part. Said Arthurs, Armstrong & Co. are, for the consideration of five thousand eight hundred dollars, payments herein described, agree to build and put for said Louis Desobry, one steam engine of the same capacity as Dr. Clements, allowing themselves the privilege of making any alterations they may think proper, so as to change the style or arrangement, so as not to take any of the utility or benefits, strength, or simplicity, away from said engine.

There is to be two cylinder boilers, made of *inimata* iron one-fourth an inch thick, to be thirty-two inches in diameter and thirty feet long.

This engine to be laid down on an entire iron frame.

The mill to be also laid down on an entire iron frame, built of the same strength as Dr. Clements', only the rollers are to be twenty-eight in. diameter, in place of twenty-six in. diameter. Rollers to be four feet long; the shaft for the rollers to be of wrought iron; there is to be two *extra crown*, which, added and two extra couplings to come with the mill and engine; also, one copper pipe, to go to the pond, and a hand-pump at the well, for to put in for the convenience of the plantation.

Said machinery all to be delivered on the plantation of Louis Desobry, on or before the first day of June next, and put up ready for use by the first day of October next.

Terms of payment—two thousand dollars on the delivery of the machinery.

Two thousand dollars on the first of March, 1848. Eighteen hundred dollars, with interest added at 8 per cent., payable in March, 1849.

One extra pinion wheel to be also furnished.

LOUIS DESOBRY,
ARTHURS, ARMSTRONG & CO.

Answer and Plea in reconvention.

Filed 19th May, 1859.

In the United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana.

John Nicholson
vs.
Louis Desobry.

Answer of Louis Desobry.

The defendant denies generally the allegations of the plaintiff. He denies that the plaintiff is the transferee of Arthurs, Armstrong & Co. He admits the contract, but alleges that instead of the mill and engine being delivered at the plantation on or before the 1st June, 1847, and to put up ready for use by the 1st October, 1847, as was stipulated in the agreement, it was not delivered until the 13th August, 1847, nor put up until the November, 1847; that by reason of the bad materials used in their construction, defective workmanship, weakness of the cylinder, iron frames, and shaft, defect in rollers, bad construction and weakness of steam chest, imperfect cog-wheels, bad construction of the chain carrier, and general insufficiency of said engine and mill, and the unworkmanlike manner with which it was erected, it would not work and answer the purposes intended, but was the cause of great loss and damage to him. He alleges, that in the month of December following, the plaintiff came to his plantation, and, after examining the mill and engine, admitted their insufficiency, imperfections, and bad construction, and agreed to return on the 1st May, 1848, for the purpose of placing stronger iron frames under the sugar mill, furnish a new roller, and wrought-iron shaft of 8½ inches in diameter, replace a new steam-chest, rebuild the carrier, and furnish a stronger chain; in fact, rebuild the engine and mill to give full and entire satisfaction to your respondent at the next rolling season; that this second agreement was not fulfilled, and the

defendant, apprehending the loss of his crop if the rebuilding and repairing of the engine and mill were delayed any longer, purchased, in the month of July, materials, and employed persons to repair and rebuild the engine and mill, so as to make them answer for the approaching grinding season; and expended the sum of $2,026 74, as will appear by the bill of items, annexed to his answer.

The defendant further alleges that he advanced, on account of the contract, the sum of $2,000 at one time, and at another $667; paid $31 88 for freight—making in all, $2,698 88, which is much more than the value of the very defective mill and engine landed on his plantation. He complains that, by reason of the insufficiency and defects of the mill and engine, the cane was not sufficiently pressed; that by frequent stoppages, caused by insufficiency and bad construction, much time was lost in the making of sugar, and the cane was damaged by frost, cold, and bad weather; that of the crop 1847, he lost:

100 hhds. of sugar, of the value of - -	$5,500
150 bbls. of molasses, - - - -	1,200
Of the crop of 1848, he lost:	
60 hhds. of sugar, of the value of - -	3,500
100 bbls. of molasses, - - - -	800
	$10,800

The several sums of $2,000, $667, $31 88, and $10,800, he pleads in reconvention.

Respondent prays that the plaintiff's suit be dismissed; and assuming the character of plaintiff in reconvention, he prays that judgment be rendered in his favor and against John Nicholson, for twelve thousand eight hundred and twenty-six $\frac{74}{100}$ dollars, with interest and costs.

Respondent prays for general relief.

GEO. L. BRIGHT, Att'y.

[Statement Annexed to Answer.]

Statement of expenses incurred by Mr. Louis Desobry, of the parish of Iberville, for repairing a steam engine and sugar mill, and of damages suffered in consequence of Arthurs, Armstrong & Co. not complying with their contract:

1. Paid A. B. Parke, for work done in rebuilding the cane carrier and repairing engine, -	$350 00
2. Paid Durand, for copper ordered by Arthurs, Armstrong & Co., - - - -	36 00
3. Parke, for fixing engine, - - -	10 00
4. Paid Peter Kelly, for working in cane carrier,	25 00
Amount carried forward,	$421 00

Amount brought forward,	$421 00	
5. Grate bars taken by A., A. & Co., and furnished to Jesse Hart, Esq.,	76 00	
6. Account of Desobry & Sons, for articles furnished,	52 41	
7. Paid Henry Warsham, blacksmith work on mill,	18 00	
8. Paid for casting for coupling shaft,	12 50	
9. Paid for cast-iron plate,	13 50	
10. Masne, for work rebuilt,	50 00	
11. Materials used in repairing and rebuilding,	150 00	
12. For taking down and rebuilding the mill on wooden frames,	220 00	
13. Paid Charles Byrnes, for copper pipe,	31 45	
14. Paid Wheeler, Geddes & Co., for castings used in repairing and rebuilding the mill, and freight on the same,	700 00	
15. Paid St. Dizier, for superintending and putting up the work,	250 00	
16. Paid freight on castings,	31 88	
		$2,026 74
100 hhds. sugar, lost crop of 1847,	$5,500 00	
150 bbls. molasses,	1,200 00	
60 hhds. sugar, lost crop of 1848,	3,300 00	
100 bbls. of molasses,	800 00	
		10,800 00
		$12,826 74

[Trial of Cause.]

November Term, 1859.

New Orleans, Thursday, 8th December, A. D. 1859.
Court met, pursuant to adjournment.
Present—Hon. Theo. H. McCaleb, District Judge.
Absent—Hon. J. A. Campbell, Presiding Judge.

3092. John Nicholson *vs.* Louis Desobry.

This cause was called, Jno. Livingston, Esq'r, appearing for plaintiff, and Geo. L. Bright for the defendant. The following jury were sworn, and empannelled to try the same, viz: Thos. Keeffe, E. R. Poole, E. C. Payne, W. C. Tompkins, D. C. Mitchell, James Medd, J. W. Gale, Ed. Booth, S. M. Todd, E. L. Tracy. H. Koppenberg, and M. J. Brennan. Whereupon, after hearing evidence and argument of counsel, E. L. Tracy, Esq., was appointed foreman, and they retired to deliberate upon their verdict; and shortly thereafter they returned into court the following: "We, the jury, "find for the plaintiff $1,781 $\frac{12}{100}$, with legal interest from 1st "January, 1848. New Orleans, 8th December, 1859. E. L. "Tracy, Foreman." Whereupon it was ordered that the same be recorded.

[Defendant's Bill of Exceptions.]

Filed 10th December, 1859.

United States Circuit Court, Eastern District of Louisiana.

John Nicholson
vs.
Louis Desobry.

Be it remembered, that on the trial of this suit, Mr. Francis Armstrong, a party named in the plaintiff's petition, testified that he is now a citizen of the State of Louisiana, and was for some time previous to the institution of this suit, and since the year 1848; and was at the time of its institution a citizen and resident of the State of Louisiana. Whereupon the counsel for defendant moved the court, as well because of the statement of said entries, as because the petition contains no allegation giving jurisdiction to this court, to dismiss this suit for want of jurisdiction.

The court refused to sustain the motion, but maintained jurisdiction upon the grounds that the plaintiff sues as a citizen of the State of Pennsylvania, and as the liquidator of the affairs of the firm of Arthurs, Armstrong & Co., of which the Armstrong mentioned in this bill of exceptions had been a member; and as owner of all assets, contracts, &c., belonging to said firm, and that, therefore, the jurisdiction of this court appears affirmatively upon the record. And thereupon the counsel for defendant tendered this bill of exceptions to the ruling of the court, and prayed that the same might be signed by the judge, which is accordingly done.

THEO. H. McCALEB, [SEAL.]
U. S. Judge.

[Motion for a New Trial.]

November Term, 1859.

New Orleans, Saturday, 10th December, 1859.
Court met, pursuant to adjournment.
Present—Hon. Theo. H. McCaleb, District Judge.
Absent—Hon. J. A. Campbell, Presiding Judge.

3092. John Nicholson
vs.
Louis Desobry.

On motion of Geo. L. Bright, Esq., attorney for defendant, it is ordered that the plaintiff show cause on Saturday next, the 17th December, instant, at 10 o'clock A. M., why a new trial should not be granted, on the grounds this day filed.

[Grounds for a New Trial.]

Filed 10th December, 1859.

United States Circuit Court, Eastern District of Louisiana.

John Nicholson
vs.
Louis Desobry.

1st. The court should have sustained the motion made to dismiss this suit for want of jurisdiction.

2d. The judgment is contrary to law and evidence, and cannot be justified by the evidence given on the trial of the suit.

3d. The jury failed to render any verdict on the reconventional demand.

[Argument of Motion for New Trial.]

November Term, 1859.

New Orleans, Saturday, 17th December, 1859.
Court met, pursuant to adjournment.
Present—Hon. Theo. H. McCaleb, District Judge.
Absent—Hon. J. A. Campbell, Presiding Judge.

John Nicholson
3092. *vs.*
Louis Desobry.

The application for a new trial in this case was argued by George L. Bright, Esq., for plaintiff in rule, and by J. Livingston, Esq., for defendant, and submitted to the court.

[Judgment Overruling Motion.]

November Term, 1859.

New Orleans, Thursday, 19th January, 1860.
Court met, pursuant to adjournment.
Present—Hon. Theo. H. McCaleb, District Judge.
Absent—Hon. J. A. Campbell, Presiding Judge.

John Nicholson
3092. *vs.*
Louis Desobry.

The court having duly considered the application herein made, on part of the defendant, for a new trial, doth now order that the same be overruled.

[Final Judgment.]

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

November Term, 1859.

New Orleans, Thursday, 19th January, 1860.
Court met, pursuant to adjournment.
Present—Hon. Theo. H. McCaleb, District Judge.
Absent—Hon. J. A. Campbell, Presiding Judge.

3092. John Nicholson vs. Louis Desobry.

By reason of the verdict herein, and in conformity thereto, it is now ordered, adjudged and decreed, that the plaintiff, John Nicholson, do have and recover judgment against the defendant, Louis Desobry, for the sum of seventeen hundred and eighty-one dollars and twelve cents, with interest thereon, at the rate of five per cent. per annum, from 1st January, 1848, till paid, and costs of suit.

Judgment rendered 19th January, 1860.

Judgment signed 25th January, 1860.

THEO. H. McCALEB,
U. S. Judge.

[Petition for Writ of Error.]

Filed 26th January, 1860.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

John Nicholson vs. Louis Desobry. No.

The petition of Louis Desobry respectfully represents, that he is aggrieved by the judgment, rendered against him on the

for the sum of seventeen hundred and eighty-one dollars and twelve cents, with interest thereon, at the rate of five per cent. per annum, from 1st January, 1848, till paid, and costs of suit; and he is advised that there is error therein, to his prejudice.

Wherefore, he prays that a writ of error therefrom be allowed him, the same to operate as a supersedeas, upon his giving such bond and security as the court may order.

Petitioner prays for general relief.

GEO. L. BRIGHT, Att'y.

[Order Allowing Writ of Error.]

November Term, 1859.

New Orleans, Thursday, 26th January, 1860.
Court met, pursuant to adjournment.
Present—Hon. Theo. H. McCaleb, District Judge.
Absent—Hon. J. A. Campbell, Presiding Judge.

3092. John Nicholson *vs.* Louis Desobry.

On motion of Geo. L. Bright, Esq., of counsel for defendant, and on presenting and filing his petition, representing that he is aggrieved by the judgment herein rendered, and praying a writ of error therefrom, the same to operate as a supersedeas, returnable to the next term of the Supreme Court of the United States, it is ordered that the same be allowed as prayed for, upon the said defendant's giving bond, with good and solvent security thereon, in the penal sum of four thousand dollars, and conditioned as the law requires.

[Bond for Writ of Error.]

Filed 26th January, 1860.

Know all men by these presents, that we, Louis Desobry as principal, and Hewitt, Norton & Co. as sureties, are held and firmly bound unto John Nicholson in the full and just sum of four thousand (4,000) dollars, to be paid to the said John Nicholson, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 25th day of January, in the year of our Lord one thousand eight hundred and sixty.

Whereas, lately, at a Circuit Court of the United States, Fifth Judicial Circuit, holding sessions in and for the Eastern District of Louisiana, at the City of New Orleans, in a suit depending in said Circuit Court, wherein John Nicholson is plaintiff, and Louis Desobry is defendant, judgment was rendered against the said Louis Desobry for seventeen hundred and eighty-one $\frac{12}{100}$ dollars, with 5 per cent. interest from 1st January, 1848, and the said Louis Desobry having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said Circuit Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said John Nicholson, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next.

Now, the condition of the above obligation is such, that if the said Louis Desobry shall prosecute the writ to effect, and pay such

judgment as may be rendered, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

LOUIS DESOBRY,
By his att'y and counsellor,
GEO. L. BRIGHT.

HEWITT, NORTON & CO., [SEAL.]
By M. O. H. NORTON. [SEAL.]

Signed, sealed, and delivered in presence of }

Approved—
THEO. H. McCALEB.
U. S. Judge.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

Clerk's Office.

I certify that the foregoing nineteen pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of John Nicholson vs. Louis Desobry. No. 3,092 of the docket of the said court.

Witness my hand, and the seal of the said court at New Orleans, this 5th March, 1860.

J. W. GURLEY,
Clerk.

[Writ of Error.]

UNITED STATES OF AMERICA, *ss.*

The President of the United States,

To the Honorable the Judges of the Circuit Court of the United States, in and for the Fifth Circuit, and holding sessions for the Eastern District of Louisiana, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or one of you, between John Nicholson and Louis Desobry, a manifest error hath happened, to the great damage of the said Louis Desobry, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there

held ; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twenty-sixth of January, in the year of our Lord one thousand eight hundred and sixty.

J. W. GURLEY,
Clerk of the United States Circuit Court
For Eastern District of Louisiana.

[Citation in Error.]

THE UNITED STATES OF AMERICA.

The President of the United States,
To John Nicholson, greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington on the first Monday of December next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, wherein Louis Desobry is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of January, in the year of our Lord one thousand eight hundred and sixty.

THEO. H. McCALEB,
U. S. Judge.

Marshal's Return.

Received January 26th, 1860, and on the 27th January, 1860, served a copy of the within on Mr. John Livingston, att'y, (in person,) at his office in this city.

Returned January 27th, 1860.

CH. CATOIR, D'y M.

Supreme Court of the United States.

[No. 60.]

DECEMBER TERM, A. D. 1865.

LOUIS DESOBRY, PLAINTIFF IN ERROR,

vs.

JOHN NICHOLSON, DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE EASTERN DISTRICT OF LOUISIANA.

On motion of counsel for defendant in error, to call and dispose of this case at the present term, filed December 7, 1865.

At the request of the Court, the following reasons are respectfully submitted in support of this motion:

It is urged:—1. Because a special notice has been served on George L. Bright, Esq., the counsel of the plaintiff in error in the court below, that the defendant in error would endeavor to have the case disposed of at the present term, as appears by the notice filed with this motion.

2. Because the bond for writ of error is technically defective—first, because it is signed, as principal, by "Louis Desobry, by his attorney and counselor, George L. Bright,"

without any seal, and without any special evidence of the authority of his attorney and counselor to sign the said bond. Second, because the bond, a sealed instrument, is signed and sealed, as sureties, in the firm name, by "Hewitt, Norton & Co., by M. O. Norton," (probably one of the firm,) without any evidence of special authority to bind the firm by a sealed instrument. (Printed Record, pp. 9, 10.)

3. Because the judgment having been rendered July 25, 1860, nearly six years ago—the lien of the judgment upon the real estate of the defendant below has almost expired, or is in danger of expiring, and leaving the plaintiff below without any security for the payment of his judgment if affirmed. (Ib. p. 8.)

4. Because the rebellion has in fact been overthrown—the national supremacy has been re-established in Louisiana, and the district court of the United States for the eastern district of Louisiana, from which this case comes, is now in full operation for the transaction of current business, and for the execution of the mandate of this court.

Of these facts this Court will take judicial notice.

If the district court of the United States for the eastern district of Louisiana is open for the transaction of *current* business, then why not for *all* business—*past*, present and future? If open for the transaction of *any* business, then why should the Supreme Court of the United States decline to exercise its supervisory powers? The subordinate courts of the United States cannot act without at the same time creating a necessity for this Court to exercise its powers of review. It is the legal right of the citizen—in this case a citizen of Pennsylvania—against whom the writ of error has been taken, to call upon this Court to exercise its functions, after a lapse of more than five years, and to see that justice is done and the process of this Court is not abused and perverted by further unnecessary delay.

But it may be objected against this proceeding, that this court ought not to act until the political status of the rebel States is defined—until they are reorganized, and it is known what their future relations are to be.

But in whatever form they may be reorganized—whether as Territories or as States, and before that reorganization is effected—the moment the rebellion was suppressed in point of fact, the Constitution and laws of the United States as the supreme law of the land were thereby re-established wherever their supremacy had been temporarily overthrown. They follow the flag as the symbol of national power.

and with them follows, *pari passu*, the national judiciary, as the necessary means of the application and enforcement of the laws. Whenever the power necessary to apply and to enforce them exists, the national judiciary created by them also necessarily exists.

If this be true, then it cannot be necessary for the national judiciary, and especially for the Supreme Court of the United States, to await the action of Congress in regard to the details of the reorganization and reconstitution of the rebel States. It is enough for it to know that the Constitution and laws of the United States are the supreme law of the land; that their supremacy has been re-established in point of fact, and with it the power necessary to enforce its judgments. The knowledge of these facts makes it both the right and the duty of the judiciary to resume the exercise of its functions. It also warrants the citizen in calling upon the Supreme Court, no less than upon the local courts of the United States, to exercise its powers in his behalf. The time or the form of the reorganization of the rebel States is wholly *immaterial* to the national judiciary; for it derives not its powers from the States or Territories, but from the nation as a whole. Whatever may be the time or the form of the reorganization of the rebel States, the Constitution and laws of the United States are supreme over them—and they are as supreme *before* their reorganization as *after* it—and, consequently, it is as much the duty of the national judiciary to administer the laws of the United States within their territory before their reorganization as after it. Hence, the duty of an immediate exercise by this Court of its revisory powers over the proceedings of the district courts of the United States, for the southern district of Louisiana.

JOHN A. WILLS,
Att'y for Def't in Error.

Supreme Court of the United States.

No. 60—December Term, 1865.

LOUIS DESOBRY, Plaintiff in Error,

vs.

JOHN NICHOLSON, Defendant in Error.

WRIT OF ERROR TO THE EASTERN DISTRICT OF LOUISIANA.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

The only question presented by the record in the case relates to the *jurisdiction* of the court below, arising under the eleventh section of the Judiciary Act of September 24, 1789.

That section provides: "That no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an ASSIGNEE, *unless a suit might have been prosecuted in such courts to recover the said contents, if no assignment had been made.*" (1 Brightly's U. S. Dig., pp. 127, 128.)

I. The first question is, whether a *partner*, who becomes the *sole owner* of the assets of a partnership, in consequence of a dissolution thereof, and an extinguishment by him of the joint rights of his associates, by a settlement with them, is such an *assignee* as is contemplated by that act.

In the case of a *partner*, who upon a settlement of the affairs of the partnership becomes the *liquidator* and *owner* of the assets of the partnership, there is *no technical assignment* of a chose of action belonging to the firm. His interest,

from the first, was joint, "*per my et per tout.*" It is thereby merely consolidated in one of the original owners. Originally, by the doctrine of survivorship, and now by extinguishment by way of settlement in such a case, or by the death of one of the partners, the whole title becomes vested in the liquidating or surviving partner. It is not the case of a transfer of an original right to a third party, that is, to an entire stranger to the original transaction.

This view is sustained by some English cases.

"Where two persons, who had entered into certain contracts with the victualing office, agreed to dissolve partnership, and executed a deed whereby one agreed to resign to the other all his interest in those contracts, all debts due the concern, and all his share of the partnership property, and the other agreed to pay him £50,000, at which sum his share and interest were valued, *Held*, that this was *not a sale of property* within the meaning of the 49 Geo. III, ch. 149, and did not require an *ad valorem* stamp." Belcher *vs.* Sikes, 6 Barn. and Cress., p. 233, (Eng. Com. Law Rep., p. 116,) and cases there cited.

The obvious policy of the act of Congress was to *prevent collusive assignments* of promissory notes or choses in action, *made with a view to confer jurisdiction* on the courts of the United States, *in cases where it would not otherwise exist.*

But in this case, jurisdiction originally existed. There has been *no essential change* of the *personnel* of the parties to the original contract, nor of the *localities* of their residences. The members of the firm of Arthurs, Armstrong & Co., at the time of the contract, were all citizens of the State of Pennsylvania. John Nicholson, the liquidating partner, is so still. Desobry was then, and still is, a citizen of Louisiana. For that reason this case is *not within the mischief* contemplated by the statute, and it ought not therefore to be held to be within the prohibitory remedy; because it is clear that the change of interest in this case among the members of the firm was not made with a view to confer jurisdiction.

II. But conceding for the sake of the argument that a partner acquiring the sole interest in a chose in action belonging to the firm, is such an *assignee* as is contemplated by the statute, the next question is:

Whether Armstrong, the retiring partner, who, after the dissolution of the partnership and *before* the institution of the suit in this case, became *a citizen of Louisiana*, was a *necessary party* to the suit in the courts of the United States sitting in that State.

If he was not, then his citizenship in Louisiana at the time of the institution of the suit is wholly immaterial, and cannot affect the jurisdiction of the court below.

That he had any interest in the cause of the action when the suit was brought, is not pretended. On the contrary, it appears, both by the allegation of the petition (printed record, p. 1) and by the statement of the bill of exceptions (ib., p. 6,) that Nicholson the petitioner had the sole and exclusive ownership of the cause of action at that time.

In a court of equity, Armstrong, having no real interest, was not a necessary party to the suit. There the real party in interest is the only party whose name need appear on the record.

But in the courts of Louisiana and other States (whose practice is adopted by the courts of the United States which set in those States) *the rule in that respect is the same, both in courts of law and in courts of equity.* Of this fact, the case of *McMicken* vs. *Webb* (11 Peters, U. S. R., p. 38) is both an illustration and a proof.

If, then, by the practice of the courts of the United States, when sitting in the State of Louisiana, Armstrong was not a necessary party to the suit, his citizenship in Louisiana, when this suit was brought, is thereby shown to be wholly unimportant and immaterial, because *both the assignors* at the date of the contract, and the *assignee* of the chose in action, at the date of the institution of the suit, were citizens of the State of Pennsylvania, and as such were fully competent to sue on it in the courts of the United States sitting in Louisiana. (Printed record, pp. 1, 6.)

There are no cases directly on this point, but the following cases afford instructive analogies, and expositions of the policy and meaning of the statute in question:

Wilson vs. *Fisher's Executors* Baldwin's C. C. R., 133, 137; *Milledollar* vs. *Bell*, 2 Wallace, Jr., Rep., 337; 6 Cranch R., 334, 336; 8 Howard's U. S. R., 441, 448, 450; 16 Peter's U. S. R., 316; 5 Cranch R., 303; 24 Howard's U. S. R., 163.

III. But, if necessary, the case may be placed on still another and different ground.

There is evidence in the record to show that after the so-called assignment of the original contract by Arthurs, Armstrong & Co. to John Nicholson, *the latter entered into a new contract* with Desobry, on the basis of the original contract, and was accepted by him as a new and original contractor.

The original contract was set up by Nicholson in his

petition only as *inducement* to the new contract entered into by him with Desobry.

He alleges in his petition, "that the contract was fully executed on his part, and the engine and mill delivered and put up on the defendant's plantation, *according to the contract on his part.*" (Printed record, p. 1.) This view is also confirmed by the defendant's answer: "Respondent prays that the plaintiff's suit be dismissed; and assuming the character of plaintiff in *reconvention*, (that is, *plaintiff in a cross-suit*,) he prays that judgment be rendered in his favor, and *against John Nicholson*, for $12,826 74, with interest and costs. Respondent prays for general relief." (Printed record, p. 4.)

If, then, this suit was based *on a new contract*, whose basis was the original contract, then the contracting parties being citizens of different States, both at the time of the contract and of the institution of the suit, there can be no question of the jurisdiction of the court.

But whether this is so or not, the facts referred to are sufficient evidence of an agreement on the part of Desobry to treat the original contract as one to be performed exclusively by Nicholson; and if so, the result is the same. "Although the cause of action be originally *joint*, the party himself who contracts with the firm *may, by his own acts, render it so far separate as to entitle a single member to sue alone.*" (Gow. on Partnership, London, ed. of 1841, p. 129.) Desobry has done so in this case, and he has thereby obviated all objection arising from the citizenship of Armstrong in Louisiana.

IV. But the objection to the jurisdiction of the court, arising out of the citizenship necessary to confer jurisdiction in this case, whether well or ill-founded, by a well established rule of this court could only be made by a *plea in abatement.*

The defendant having pleaded to the merits, thereby waived the objection, and it was too late to move, on the trial, to dismiss the suit for want of jurisdiction. (Sheppard *et al. vs.* Graus, 14 Howard's U. S. R., 511; Jones *et al. vs.* Logue, 18 *ib.*, 76, 81.)

It results, therefore, from these various considerations, that the court below was right in refusing to dismiss the suit for want of jurisdiction, and that the judgment should be affirmed.

JOHN A. WILLS,
Attorney for Defendant in Error.

Supreme Court of the United States.

No. 60.

LOUIS DESOBRY

vs.

JOHN NICHOLSON.

WRIT OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

Brief and Argument on behalf of the Plaintiff in Error.

THE Record in this case raises but a single question, which is one of jurisdiction merely.

On the 16th of April, 1859, John Nicholson, the Defendant in Error, filed his Petition against Desobry, the Plaintiff in Error, claiming compensation for the erection of an engine and mill upon Desobry's Plantation. The Petition (p. 1,) commences thus:

"The Petition of John Nicholson, a resident of the City of Pittsburgh, and a citizen of the State of Pennsylvania, respectfully represents, that Louis Desobry, a citizen of the State of Louisiana, and a resident of the Parish of Iberville, within the jurisdiction of this Honorable Court, is truly and justly indebted, &c., for this, to wit:

That the firm of Arthurs, Armstrong & Co., doing business at Pittsburgh, composed of John Arthurs, F. Armstrong and Petitioner, all citizens of the State of Pennsylvania, on the 19th day of December, 1846, entered into a written contract with the Defendant, to build him a steam engine and mill, &c."

It then recites "that before the completion of said contract, the firm of Arthurs, Armstrong & Co. was dissolved, and the Petitioner became liquidator of the affairs of said firm and owner of all assets, contracts, &c. It then proceeds:

"Petitioner now represents that the contract was fully executed on his part, &c."

The answer (p. 3,) denies the allegations, generally and particularly, and prays damages in reconvention.

The verdict (p. 5,) was for Plaintiff.

By the Bill of Exceptions, (p. 6,) it appears that Mr. F. Armstrong, one of the original contracting parties named in the Petition, testified that he was a citizen of Louisiana at the time of suit brought, and had been, since 1848. Whereupon, the Plaintiff in Error moved to dismiss the suit for want of jurisdiction. But the Court refused to do so, on the ground that as the Plaintiff (below) sued as a citizen of Pennsylvania, and as liquidator of the affairs of Arthurs, Armstrong & Co., and owner of their assets and contracts, the jurisdiction of the Court appeared affirmatively on the record.

In opposition to this ruling of the Court, it is respectfully submitted, on the part of the Plaintiff in Error, that the Petition does not state facts sufficient to maintain jurisdiction.

Undoubtedly, the citizenship of the parties to the proceeding is fully and affirmatively set forth, but it is not so as to that of the members of the firm of Arthurs, Armstrong & Co., with whom the Plaintiff in Error is alleged to have entered into the contract on which the action is founded. The allegation as to their citizenship does not refer to the time of the institution of the suit, but to the date of the contract, which was December 19th, 1846. The language of the Judiciary act (1789, ch. 20, sec. 11,) would seem to establish, by itself, without need of interpretation, that whenever there is a suit upon a chose in action assigned, the assignor must be (and of course must be distinctly alleged to be) a citizen of a different State from that of the Defendant, *at the time of suit brought.* But the authorities are clear to the point.

See Milledollar vs. Bell, 2 Wallace, Jr. 334, 338, and cases cited.
Fletcher vs. Turner, 5 McLean, 468.
Rogers vs. Linn, 2 McLean, 126.
Thaxter vs. Hatch, 6 McLean, 68.

That the Defendant in error claims as assignee, is manifest from the Petition itself; for, according to its allegations, he was but one of the original contractors, and only became "owner" of the contract, upon the dissolution of the firm, the date of which is not set forth. Of course he could only have acquired the sole interest in a joint contract by assignment of the interests of his co-contractors. Nor does he even aver that he himself wholly performed the contract, or that no part of it had been performed before he became owner. On the contrary, he only and cautiously charges that he became owner "before the *completion* of the contract," and the part which he alleges that he performed was simply that of "delivering" and "putting up" the engine and mill; not that of "building" them, which was the heaviest part of the job for which the contract provided.

The case therefore stands upon the ordinary ground of a *chose in action* assigned, and is not only not excluded from the operation of the judiciary act, but seems to be clearly brought within it, by the decision in

McMicken v. Webb, 11 Peters, 25.

There the Plaintiff was treated as sole owner *ab origine*, and not assignee, of a note given to McMicken & Ficklin, upon the ground that it was given nominally to that firm, (of which he had been a member,) after it had been dissolved; that Ficklin had never had any interest in the note to assign, and that it had been executed in the firm name only for McMicken's especial and exclusive benefit, and in payment for his share of the partnership assets. For these reasons it was held, that it was not necessary to aver in the petition that Ficklin as well as McMicken could have prosecuted an action on the note in the U. S. Circuit Court at the time of suit brought. But the decision of the